In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-449

SIDNEY GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner sought damages under the Federal Tort Claims Act for alleged malpractice in January 1966 by a Veterans Administration psychiatrist.

On January 25, 1966, Dr. Joseph Heller, the chief psychiatrist at the Veterans Administration neuro-psychiatric outpatient clinic in Los Angeles, California, wrote petitioner that he had received the report of petitioner's barium enema x-ray and that "[t]here is indication of a slight inflammation, but there is no evidence of any tumor or ulceration, so there is nothing to cause you concern." On February 3, 1966, however, petitioner was admitted to Wadsworth Veterans Administration Hospital in West Los Angeles where he was diagnosed as having diverticulitis. Following petitioner's admission to the hospital, the x-rays referred to by Dr. Heller in his letter were evaluated

and found to reveal diverticulitis. Beginning on February 13, 1966, petitioner underwent a series of operations stemming from his diverticulitis that necessitated intermittent hospitalization until July 1969.

On August 16, 1969, petitioner filed an administrative claim with the Veterans Administration, alleging that he had been damaged by acts of medical malpractice. When that claim was denied, petitioner filed this Tort Claims Act suit which, as amended, alleged that Dr. Heller was negligent in misreading petitioner's x-ray of January 18, 1966. The government contended, *inter alia,* that the action was barred by the two year statute of limitations, 28 U.S.C. (1964 ed.) 2401(b).[1] The government relied upon statements made by petitioner to the Veterans Administration which showed that petitioner had knowledge of the acts constituting the alleged malpractice more than two years before he filed his administrative claim.[2]

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[1]The Act's limitation provisions were amended in 1966, effective as to claims accruing on, or after, January 18, 1967. 80 Stat. 307, 308. So long as petitioner's claim accrued more than two years before petitioner filed his administrative claim, however, the government would prevail under the new provision.

[2]The statements are as follows: In a prerecorded statement made to the V.A. on May 18, 1966, petitioner stated that Dr. Gordon, a physician treating the petitioner at Wadsworth Hospital, after reading the x-ray in question, "came up with the diagnosis that I was afflicted with diverticulitis." Petitioner concluded therefore that "[d]efinitely a mistake was made" when the barium x-ray was diagnosed as negative by Dr. Heller. Furthermore, in a letter dated October 7, 1966, petitioner referred to the "incorrect diagnosis of a barium enema exray of Jan. 18, 1966". In a letter dated February 28, 1967, petitioner stated that the conclusion contained in Dr. Heller's letter, which was "based upon at least two doctors examining the results of a Barium Exray" was "utterly wrong". Finally, in a letter of July 22, 1967, petitioner said that the barium x-ray of January 18, 1966 was "read wrong."

After an evidentiary hearing, the district court found that petitioner "discovered and in the exercise of reasonable diligence should have discovered the acts constituting the alleged malpractice more than two years before the filing of either his administrative claim * * * or a tort claims action."[3] Accordingly, the district court dismissed the complaint on the ground that the action was barred by the two year limitation period within the Tort Claims Act. The court of appeals affirmed (Pet. App. A).

1. Petitioner asserts that the decisions of the Ninth Circuit in the instant case and in *Ashley* v. *United States*, 413 F. 2d 490 (C.A. 9), conflict with the decision of the Second Circuit in *Kossick* v. *United States*, 330 F. 2d 933 (C.A. 2), certiorari denied, 379 U.S. 837, on the question whether the Tort Claims Act statute of limitations is tolled on a medical malpractice claim during a period when claimant is receiving continuous treatment. *Kossick*, however, did not hold that the statute of limitations is tolled during continuous treatment. The court merely indicated in dictum that even if "such considerations" were to toll the statute, the claimant in that case had nevertheless failed to file within the limitations period. *Id.* at 936. In the decade since *Kossick* was decided, no court of appeals has adopted that dictum. See *Ashley* v. *United States*, *supra*; *Tyminski* v. *United States*, 481 F. 2d 257 (C.A. 3); *Cooper* v. *United States*, 442 F. 2d 908 (C.A. 7).

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[3]The district court also found that:

"No statements or representations were made to plaintiff by employees of defendant which prevented plaintiff from acquiring * * * knowledge [of facts sufficient to alert a reasonable person that there may have been negligence] or, discovering said [negligent] acts more than two years before the filing of either his administrative tort claim * * * or a tort claims action * * *."

2. Even assuming *arguendo* that the statute is tolled when a patient receives corrective treatment from a physician who was allegedly negligent, there is no reason why that rule should be extended to cover the situation presented in the instant case: where a patient receives corrective treatment from government physicians subsequent to an alleged act of negligence committed, by a *different* government physician at a different government facility. The practical consequence of such a rule would be that the limitation period would never expire for patients, such as petitioner, all of whose continuous medical care is supplied by government physicians at government facilities. Accordingly, where, as here, a relationship no longer exists between the patient and the particular physician who is charged with negligence,there is no justification for abridging the two year limitation period necessary to protect the United States against stale tort claims.

3. Petitioner also urges this Court to hold that a physician's negligent or intentional misrepresentations will toll the statute of limitations (Pet. 23). This case does not present that issue, however, for the district court found that "[n]o statements or representations were made to plaintiff by employees of defendant which prevented plaintiff from acquiring said knowledge or discovering said acts more than two years before the filing of his administrative tort claim * * * or a tort claims action."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.